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No more name-calling, please

Large patent portfolios fall victim to patents suits from small, independent asserters not because such people are "extortionists," but because the portfolios they target are not as strong as their owners would like to think

The IP community needs to get a life. The term patent troll serves no one. Terrorist is even worse. Used to describe assignees that do not practise, but hope to profit from the rights to an invention, it underscores fundamental weaknesses in many companies. This is more than semantics. It's about an evolving understanding of innovation. Crying the "t" word over disputed patents threatens us all.

Some who assert patents could be considered extortionists. Those with dubious patents out for the short money from businesses with deep pockets are relatively uncommon. Most of the speculators I run into conduct extensive due diligence others may have failed to. Their goal is to identify significant holes in a company's patent defence and to extract a price. Some have purchased rights from inventors who cannot afford to enforce them. Most are willing to put their money where their accusations are. This newfound perseverance scares the heck out of companies who are not used to having their freedom to operate challenged by relative small fry.

Patent assertion illustrates that, despite the R&D dollars that underlie many of them, large IP portfolios are often weaker than they appear. Demonising asserters adds to the confusion. It makes it more difficult for CEOs, board members and others to distinguish between legitimately strong patents and weak ones, as well as shakedown artists out for a quick buck from those that can inflict real damage. The business media, ill-informed, fan the flames of these misunderstandings. The result is that most company managements are reluctant to use their IP assets for greater profitability if it involves going on the attack. Fear of being branded a troll is a kind of 21st century Scarlet letter. Shareholder value be damned.

Independent asserters

Independent asserters is a more accurate term for those who choose to defend their innovation rights against infringers by entering into a licensing agreement or, if necessary, filing a law suit. Thoughtful IP owners are advised to refrain from labels that could be used to describe their own best practices. There is no prohibition against owning or enforcing patent rights without practising them. Succeeding at innovation may require that portfolio owners think more like their attackers, rather than hurl epithets at them.

Some companies seem to be taking a page from the independents' handbook. Hewlett Packard, Sony and Microsoft, for example, already are investing hundreds of millions of dollars in a patent acquisition fund. What they plan to do with these patents is unclear. Some companies are even segregating IP assets in a special purpose entity (SPE) remote from easy counter assertion.

Innovation is the developed world's greatest business asset. While companies need more reliable, better-searched and timelier patents, they also need better mechanisms for resolving disputes. The greatest threats to innovation are the one-two punch of dubious patents and costly litigation. It should not cost US$4 million to US$10 million, nor take two or more years to prove a patent valid or not. Patent disputes are inevitable. How they get resolved is not.

Many of the large patentees who doth protest loudest ultimately rely on PTO inefficiencies to build, defend and profit from their own patent portfolios. It would be terrific if the USPTO (and the EPO and JPO) issued more reliable patents that could not be so readily invalidated (the rate is about one in three). But, because of high costs and difficulty retaining experienced examiners, that change is not likely to occur anytime soon. Traditional patent litigation may not be the solution, but neither are unrealistic expectations about improving quality and making independent asserters go away.

Companies started the IP wars in the 1980s with significant resources – large patent portfolios and huge litigation war chests and the patience to dig in for the long haul. At that time, few inventors and businesses had sufficient means to defend themselves. There was little to fear. But the tables have turned. Today, well-informed and funded patent acquisition entities, and even law firms, are prepared to challenge the complex rights that cover inventions. The take-away: large patent portfolios are not necessarily comprised of good patents.

Potential backlash

Like nuclear powers, patentees with significant portfolios are armed to defend themselves against their peers. Many cases are settled with gentlemanly cross licences. However, in a guerrilla war, the kind independent owners are likely to wage, Goliaths are often more vulnerable than Davids. Companies do themselves a disservice by grumbling about the inherent unfairness of the patent system, which they themselves probably help to perpetuate. They need to learn how to fight back with stronger, better-researched patents, smarter enforcement strategies, and more prudent approaches to licensing and dispute resolution.

Granting patent rights and establishing their value as intangible assets have a generally positive long-term effect on innovation and shareholder value. IP holders' reluctance to manage their IP actively, for fear that doing so is unfashionable or, even worse, unethical, may come to haunt them.

Companies and financial journalists must learn to distinguish between different types of patents assertions and not prejudge them based on who owns the rights or practises the IP. They also should be less arrogant about the ubiquity of their portfolios, despite their bulk or cost. Some companies' patents are more questionable than they are willing to admit. Independent asserters are in a better position than ever to prove it.

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